NO. 73-5412

Supreme Court of the United States

OCTOBER TERM, 1973

JOHN R. DILLARD and WILLIE WILLIAMS, individually and on behalf of all other persons similarly situated,

Appellants,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY,

Appellees.

On Appeal From The United States District Court For The Eastern District of Virginia

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND ELLENMAE CROW AS AMICI CURIAE

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INDEX

CITATIONS

CASES:

CONSTITUTION AND STATUTES:

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This brief as *amici curiae*, in support of the position of the appellants, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), United Steelworkers of America, AFL-CIO, and Ellenmae Crow, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTERESTS OF AMICI CURIAE

The AFL-CIO is a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women. The United Steelworkers of America is an international union with a membership of approximately 1,250,000 workers.

The question in the instant case is whether an injured working man or woman receiving workmen's compensation can have the payments he or she is receiving under an award cut off by reason of an *ex parte* determination that there is "probable cause to believe" that there has been a "change in condition." The Federation and the Steelworkers have a two-fold interest in the manner in which this question is resolved.

First, the individual members of the AFL-CIO and the Steelworkers constitute the largest single class of beneficiaries of the workmen's compensation system. The nature of the procedures utilized in that system is therefore a major concern of these organizations. Second, the Federation and the Steelworkers are petitioners in *Crow, AFL-CIO and Steelworkers* v. *California Department of Human Resources Development, et al.*, Supreme Court of United States, No. 73-1015. The question presented in that case, which is presently pending on a petition for a writ of certiorari, is whether a procedure for terminating unemployment benefits which does not afford a recipient prior notice, a meaningful chance to obtain representation and gather evidence, an opportunity to appear personally and confront and cross-examine witnesses, or a decision by an impartial decision-maker based solely upon evidence adduced at a hearing, satisfies either the "when due" or "fair hearing" requirements of the Social Security Act, or due process. As emphasized in that petition (at pp. 7-8), while the context provided by the unemployment and workmen's compensation systems implicate different factors, that may justify differing results in this case and in *Crow* (see pp. 21-23 *infra*), the question presented here and that presented

there, are, in terms of basic constitutional principle, closely brigaded. Thus, the decision in the instant case may have substantial ramifications on the course of the *Crow* litigation.

Ellenmae Crow, individually and on behalf of all others similarly situated, is also a petitioner in the above noted unemployment compensation case pending before this Court. Her interest in the instant case is identical to the second of the interests of the AFL-CIO and the Steelworkers just described.

ARGUMENT

1. *Statement Of The Issue Presented And Of The Case.*

Litigation is a method for determining whether the *status quo ante* shall be changed. The impetus for a judicial or administrative determination is the moving party's demand that another change his course of conduct or that he be treated differently, and the latter's refusal to voluntarily agree. Such determinations take time, often in considerable amounts. Delay is thus an inherent cost of this method of dispute settlement. Who shall bear that cost is, therefore, of critical significance. The legal rules which govern that determination are those which set the terms upon which interim relief pending a final decision on the merits is available. Initially, the costs of delay are on the moving party. The preliminary injunction shifts those costs to the other party. Moreover, in a system providing for appeals the costs of delay are on the appellant. A stay shifts those costs to the appellee. Because of its cost-shifting function, interim relief is often more important in practical terms than the final determination on the merits.

It is therefore essential that the rules governing such relief embody neutral principles that, to the extent possible, limit overall social costs.

The instant case tests the validity under the due process clause of the Fourteenth Amendment of the procedure Virginia has adopted to allocate the costs of delay incident to the filing, by an employer or his insurance carrier, of an application for review of an award of workmen's compensation, alleging a "change in condition" of the injured worker receiving compensation by virtue of that award. *See,* § 65.1-99, Code of Virginia.

The essentials of the procedural setting were stated by the court below:

> "Pursuant to the Act, compensation is paid for all workmen coming within the provisions of the Act if injured during the course of their employment.
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> • • • •
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> "The Commission, operating within the general regulatory and judicial functions, is charged with the administration of the Act. When an employee is injured, he may enter into a 'Memorandum of Agreement' with his employer or the employer's insurance carrier, stipulating the right to compensation, and the period of payment. The memorandum is then submitted to the Industrial Commission for approval. This was the procedure followed in the case at bar. If an agreement is not approved, or if the parties have not been able to agree, the matter is heard and determined by the Commission. • • • .
>
> "A review of an award may be had upon motion of the Commission or of any party in interest 'on the ground

> of a change in condition.' Virginia Code Section 65.1-99. Upon such review, the Commission may increase or decrease the compensation previously awarded, but no such review 'shall affect such awards as regards money paid.' Virginia Code 65.1-99." A. 47, 48.

That court then noted that the effect of Rule 13 of the Industrial Commission of Virginia is that

> "the Commission will not hear the petition of the employer or insurer asserting any change in condition if payments under the award have not been made up to the date the application is deemed filed, with an admonition that benefits *shall not* be suspended until the supporting evidence submitted with the petition has been reviewed and it is determined probable cause exists to believe a change has occurred, and if a finding of a probable cause is made, the application will then be deemed filed." A.51; emphasis in original.

And the lower court went on to hold that

> "assuming that the Rule does not provide for notice and a hearing to the employee prior to termination of the award, and that the Rule is authority for the employer or insurer to terminate payments, under the facts and circumstances in this case the State function involved does not constitute a denial of due process." A.52.

Thus, the court below recognized that as a matter of Virginia law, injured workers who have received an initial award have a right to receive compensation (and that insurers have a corresponding obligation of payment) until the Commission determines that there has been "a change

in condition."[1] But it held that this right and this obligation may be cut off through an *ex parte* procedure in which the insurer, who has the burden of proof in the eventual hearing on the merits (e.g., *J.A. Foust Coal Co.* v. *Messer*, 195 Va. 762, 80 S.E. 2d. 533), is merely required to demonstrate that "probable cause exists;" the injured worker's only recourse being a subsequent hearing on the merits several months later.[2] In other words, that court sanctioned the shifting, to the injured worker, of the costs of litigation delay attendant upon an insurer's application, without providing the worker any opportunity to be heard, and without conditioning the granting of this preliminary relief on proof that the insurer is more likely than not to prevail.

That understanding of the requisites of the Fourteenth Amendment cannot be squared with the basic principles of due process enunciated by this Court.

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[1] In the court below the parties engaged in an extended debate as to whether the challenge here was to "state action." The appellants also brief that question at length to this Court. The court below found the existence of state action to be so clear that it proceeded directly to the Fourteenth Amendment issue posed. In this it was entirely correct. The procedures the Commission utilizes to determine whether there has been a "change in condition" are certainly "state action."

[2] The lower court without citation to the record placed the average time for a subsequent hearing at one month. A. 52. But the State admitted that the average time necessary to secure a hearing and decision (grouping all cases heard) was three months, and that the range was from one to eight months. A. 31, 37. There is nothing to indicate that there is any distinction in terms of time between hearings on initial eligibility and hearings concerning cut offs.

2. *The Right to a Prior Hearing*

(a) We start from the central constitutional premise relevant here, as stated in the most recent precedent in point, *Board of Regents* v. *Roth*, 408 U.S. 564:

> "When protected interests are implicated, the right to some kind of prior hearing is paramount.
>
> • • • •
>
> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U.S. 371, 379. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations . . . due process requires that when a state seeks to terminate [a protected] interest . . ., it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' *Bell* v. *Burson*, 402 U.S. 535, 542." *Id. at* 569-570, n. 7; emphasis in original.

This case, like *Roth*, is *not* one presenting a "rare and extraordinary situation in which this Court [has] held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing," (*id.* at 510, n.7). Those have uniformly been situations in which health, safety, or a general public interest has been immediately threatened: "[T]he Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure and to protect the public from misbranded drugs and con-

taminated food." *Fuentes* v. *Shevin*, 407, U.S. 67, 91-92; footnotes omitted. Certainly, there is no governmental interest of comparable magnitude in this case. Here as in *Fuentes*, the state has "allow[ed] summary seizure of a person's possession when no more than private gain is directly at stake," (*id.* at 92).

(b) "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Roth*, 408 U.S. at 569. Mr. Justice Stewart went on to state:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> "Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U.S. 254). • • •
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> • • • •
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> "To have a property interest in a benefit, a person clearly must have a legitimate claim of entitlement to it.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in

> *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." *Id.* at 576, 577; footnote omitted.

As we have shown (pp. 5-6 *supra*), Virginia law creates a right to compensation in injured workers who have received an initial award, and an obligation in the insurer to make payments to them, until the Commission determines that there has been a "change in condition." It follows that here, as in *Goldberg* v. *Kelly,* 397 U.S. 254, the individuals threatened with a cut off do have "a legitimate claim of entitlement to" payment. For this case, like *Goldberg,* involves "person[s] receiving • • • benefits under statutory and administrative standards defining eligibility for them, [who] have an interest in continued receipt of those benefits." Thus, the interest in this case is one "safeguarded by procedural due process." *Roth, supra.*

In *Roth,* the Court drew a sharp distinction between the test for determining whether due process requires a prior hearing, and the criteria for determining the *form* of a required prior hearing:

> " 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' *Boddie* v. *Connecticut,* [401 U.S. at] 378. See, e.g., *Goldberg* v. *Kelly,* 397 U.S. 254, 263; *Hannah* v. *Larche,* 363 U.S. 420. The constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." 408 U.S. at 570-571, n.8; emphasis in original.

Rather, that constitutional right exists whenever the party seeking the hearing has a "property" or "liberty" interest: "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.* at 570-571; emphasis in original.

What has been said thus far demonstrates that a protected interest in property is implicated here. This being so, the holding of the court below (A.52), that due process does not require *any* form of prior hearing, is clearly wrong.[3]

3. *The Form Of The Prior Hearing*

The lower court compounded its error by sanctioning a procedure in which a moving party seeking to deprive another of a property right may secure preliminary relief: without notice to the latter; and without demonstrating that he (the moving party) is more likely than not to prevail on the merits.

(a) The Chief Justice has reminded that this Court has

> "stated time and again that reasonable notice of a charge and an opportunity to be heard in defense

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[3] That court's emphasis on the fact that a subsequent hearing was available (A. 52), was entirely misplaced:

> "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Fuentes*, 407 U.S. at 86.

> before punishment is imposed are 'basic in our system of jurisprudence.' *In re Oliver*, 333 U.S. 257, 273. • • • We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake. E.g., *Sniadach* v. *Family Finance Corp.* 395 U.S. 337;" *Groppi* v. *Leslie*, 404 U.S. 496, 502.

Sniadach v. *Family Finance Corp.*, 395 U.S. 337, 339, cited in *Groppi*, held that a garnishment procedure whereby a "wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have," pending "the trial of the main suit," does not accord with the Fourteenth Amendment. The due process interest protected in *Sniadach* is parallel to that here. Workmen's compensation is the injured workers' substitute for the wages he had previously earned.

So far as we are aware, no opinion of this Court has even suggested that in a non-emergency situation, a procedure that fails to meet the requirements stated in *Groppi* could pass constitutional muster. Thus, injured workers receiving workmen's compensation are plainly entitled to a prior hearing affording them "reasonable notice" and "an opportunity to be heard in defense." *Groppi, supra.*

To be sure, providing these safeguards imposes some costs in terms of added delay and administrative expense. But

> "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell* v. *Burson*, [402 U.S.] at 540-541; *Goldberg* v. *Kelly*, 397 U.S. at 261. Procedural due

process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." *Fuentes*, 407 U.S. at 90, n.22. *See also, Stanley* v. *Illinois*, 405 U.S. 645, 656.

(b) The norm reflected, *inter alia*, in the law of injunctions, is that to secure preliminary relief the "movant must show a substantial likelihood of success on the merits," (*Delaware & Hudson R. Co.* v. *U.T.U.*, 450 F.2d 603, 619 (C.A.D.C.), *cert. denied*, 403 U.S. 911). That is the minimal standard necessary to meet the requirements of procedural due process here. "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser* v. *Randall*, 357 U.S. 513, 525. Thus, "In civil cases • • • this Court has struck down state statutes unfairly shifting the burden of proof." *Id.* at 524. As Mr. Justice Harlan explained, concurring in *In re Winship*, 397 U.S. 358, 370-371:

> "First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions

concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

"A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. * * * On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plantiff's favor. * * *

"The standard of proof influences the relative frequency of these two types of erroneous outcomes. * * * Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each."

The inquiry is, therefore, what standard of proof in preliminary workmen's compensation proceedings will create the least "social disutility."

The injured worker who is receiving payments under an initial award has a property interest in those payments. *See*, pp. 8-10, *supra*. Indeed, they are a basic form of income maintenance, upon which workers rely as being continuously available should they become injured on the job. *See*, pp. 15-16, *infra*; A. 64.

"Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken de-

> privations of property, however, it is axiomatic that the hearing must provide a real test. '[D]ue process is afforded only by the kinds of "notice" and "hearing" that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . . .' *Sniadach* v. *Family Finance Corp.* [395 U.S.] at 343." *Fuentes,* 407 U.S. at 97.

No "test" is provided by a standard of proof that permits property deprivations where the taker is not required to show the likelihood of success on the merits. By definition, to relax the standard to a mere showing of "probable cause" to believe that the taker can prove a case, is to maximize, and not, as is required,

> "to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Fuentes,* 407 U.S. at 81.

It would be unthinkable for workmen's compensation to be permanently terminated in cases where the insurer has not convinced the trier of fact that his position is correct. *Sniadach* and *Fuentes* teach that an improper preliminary deprivation of workmen's compensation is also a constitutional wrong: "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley* v. *Illinois,* 405 U.S. at 647, quoted in *Fuentes,* 407 U.S. at 82. Thus, a taking that would be unlawful if done on a permanent basis is equally unlawful if done on a temporary basis, at least in the absence of the most substantial overriding considerations. There are no such considerations here.

The only state interest claimed by Virginia is fulfillment of its "duty to *both* private parties to see that they receive a fair shake." Motion to Affirm, p. 5; emphasis in original. That interest is *not* served by preliminary relief on a mere showing of "probable cause." The higher standard of proof required by due process does not impose any cost whatsoever on the State. It is no more time consuming or difficult to apply one standard than the other. And the State starts from the premise that it has no interest as to which of the parties before it prevails.

In contrast, the harm caused to the injured worker by misallocating the burden of proof may be overwhelming.

First, workmen's compensation normally is the injured worker's sole source of income. Workers who do the hard and dirty jobs are typically among the lowest paid and are the most likely to utilize the workmen's compensation system. Thus, loss of compensation, even more than the loss of a portion of wages through garnishment, "may as a practical matter drive a wage-earning family to the wall," (*cf., Sniadach,* 395 U.S. at 341-342).

Second, the premature cut off of payments may, therefore, force the still injured worker to return to the job to support his family. The dangers thereby caused are too high a price to pay in a civilized society.

Third, for the same reasons, a premature cut off provides the insurer with "enormous * * * leverage" (*Sniadach,* 395 U.S. at 341), to force the worker into an unconscionable settlement.

Finally, the "probable cause" standard provides a significant incentive to insurers to file insubstantial ap-

plications. The insurer has everything to gain and nothing to lose in attempting to cut off the injured worker. Where all that need be proved is "probable cause," the likelihood of success is great and the cost of preparing a "case" is minimal. As to Virginia's "safeguards" against abuse by insurers (A. 51), Judge Merhige stated the obvious when he commented that "while the theory may sound well, as a practical matter it is useless. * * * I can hardly see the threat of assessment of attorney's fees or costs being of any consequence in the instant situation," (A. 64).

The insurer's interest, of course, is to make as few payments as possible. That interest, to the extent it is legitimate, is met through a system which permits preliminary relief upon a showing that the insurer is more likely than not to prevail on the merits. We do not blink at the fact that this higher standard may result in some erroneous payments. But, given the "humane purposes" (A.61), of workmen's compensation, which reflects the public interest in continued payments to workers injured on the job, this consequence creates far less "social disutility" (*Winship*, 397 U.S. at 371), than the consequences of the "probable cause" standard.

In concluding this portion of our argument, we note that the Court is considering a related standard of proof question, arising in a sequestration context similar to the replevin situation presented in *Fuentes. Mitchell* v. *W. T. Grant Co.*, No. 72-6160; oral argument presented Dec. 4, 1973. Without addressing the result that should be reached there, we emphasize that neither of the countervailing factors with which Mr. Justice White was concerned in his dis-

sent in *Fuentes*—that "the likelihood of a mistaken claim * * * is [not] sufficiently real," and that it is not in the interest of the moving party to take "precipitate action," (407 U.S. at 100),—is present here. *See,* Appellant's Brief at pp. 22-24, which demonstrates the absence of these countervailing factors in the workmen's compensation setting.

(c) Given what has been shown thus far, reversal and a remand is required, with directions to the lower court to order the State: to provide a prior hearing embodying "reasonable notice" and "an opportunity to be heard in defense," (*Groppi,* 404 U.S. at 502); and to grant relief to an insurer only upon a showing that he is more likely than not to prevail on the merits.

Beyond this the exact form of the prior hearing "depend[s] on the importance of the interests" involved, (*Roth,* 408 U.S. at 557, n.8). Neither the lower court opinion nor the record contain a full recitation of the facts relevant in evaluating those interests. For example, the exact nature of Virginia's present procedure is not spelled out, and there is no record evidence on the experience under that procedure. In *Fuentes,* 407 U.S. at 96-97, and *Christian* v. *New York State Department of Labor,* —— U.S. ——, 42 L.W. 4181, 4184 (Jan. 21, 1974), the Court, in similar circumstances, remanded to allow the development of a more complete record and to secure the benefit of a lower court opinion. The same course would appear appropriate here.

(d) In the event the Court chooses nonetheless to take this occasion to state the precise form of hearing required, we show, in brief outline, why only an "evidentiary pretermination hearing," (*Wheeler* v. *Montgomery,* 397 U.S.

280, 282),—*viz.*, a meaningful opportunity to obtain representation and gather evidence, an opportunity to appear personally, offer evidence, confront and cross-examine witnesses, and a decision by an impartial decision-maker based solely upon evidence adduced at a hearing—will suffice. *See, Goldberg* v. *Kelly,* 397 U.S. at 267-271.

This Court has never determined whether an evidentiary pre-termination hearing is required, where, as here, there is not "undisputed ownership," (*Fuentes,* 407 U.S. at 86), but rather competing private claims to the property in question. It is settled only that such hearings must be held where a cut off of sustaining funds (like welfare) is threatened and the competing claimant is the government. *See, Goldberg* v. *Kelly, supra.* While that is the paradigm case, it cannot be assumed to be the exclusive instance.

The right to an evidentiary pre-termination hearing is determined by a "weighing process," (*Roth,* 408 U.S. at 570). In striking the balance, this Court's recognition that procedures which do not minimize "unfair and mistaken deprivations of property," (*Fuentes,* 407 U.S. at 97), of the "person whose possessions are about to be taken," (*Id.* at 90, n.22), impose an intolerable social cost, is of decisive weight.

Of course, no system of adjudication can insure against mistaken deprivations of property. *See,* pp. 12-13, *supra.* But in the context of the workmen's compensation system only an evidentiary pre-termination hearing holds the realistic promise of producing generally accurate results. The questions posed on an application alleging a "change in condition" are simply too complex to be resolved correctly

in a summary fashion. Those applications raise such issues as the extent of medical recovery, whether there has been a refusal to accept a job suitable to the injured worker's capacity, and whether there has been a refusal of medical attention. *See,* Va. Code §§ 65.1-8, 65.1-63, 65.1-88. Thus, they require the resolution of contrasting professional opinions and conflicting versions of events. *See,* Appellant's Brief at pp. 24-25, and the cases there cited. As our court calendars attest this is grist for the adversary mill.

We fully recognize that the more complex the procedure, the greater the possibility of financial loss to insurers occasioned by payment to workers no longer eligible. However, the harm to injured workers improperly cut off through summary procedures that do not afford them an adequate opportunity to defend themselves against their insurers' charges, and the damage to the social purpose favoring the continued payments to such workers, is far greater. *See* pp. 15-17, *supra.* In every instance, the insurer makes the charge of "change in condition" on the basis of evidence within his possession. The injured worker is consequently placed in the position of having to rebut the insurer's allegations. Thus, the position of the injured worker in the litigation process is in all essential respects the same as that of the welfare recipient in *Goldberg* v. *Kelly, supra.* And what the Court said there is precisely in point here:

> "[The evidentiary hearing is] important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.
>
> • • • •

"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing • • •. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in any termination proceedings, written submissions are a wholly unsatisfactory basis for decision. • • •

"In almost every setting where important decisions turn on questions of facts, due process requires an opportunity to confront and cross-examine adverse witnesses. • • • What we said in *Greene* v. *McElroy*, 360 U.S. 474, 496-497, is particularly pertinent here:

> '• • • [w]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.'
>
> • • • •

> " 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel' • • • Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. • • •
>
> "Finally, the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. • • • To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relies on • • •, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." 397 U.S. at 268-271, footnotes omitted.

4. *The Relationship, And The Distinctions, Between The Instant Case And The Crow Case.*

In setting out the interests of the *amici curiae* we noted (at pp. 2-3, *supra*), that the AFL-CIO, the Steelworkers, and Mrs. Crow are joint petitioners in No. 73-1015, presently pending before this Court on their petition for a writ of certiorari. It remains, therefore, to discuss the issues presented here against the background provided by *Crow*.

The *Crow* case involves the termination in summary fashion of unemployment benefits due to unemployed workers who previously had been found initially eligible for a fixed number of weeks. The procedure utilized there did not provide an "evidentiary pre-termination hearing," (*Wheeler*, 397 U.S. at 282). (Indeed, the procedures followed in *Crow* were in essence those struck down in *Wheeler*.) Thus, the issue developed in the *Crow* record and treated by the lower courts was whether the safe-

guards enumerated in *Goldberg* v. *Kelly*, 397 U.S. at 267-271, apply to unemployment benefit cut offs as well as to the termination of welfare benefits.

As we have noted, the right to an evidentiary pre-termination hearing in any particular situation is determined by a "weighing process" of the interests involved. *Roth*, 408 U.S. at 570. This, of course, is not the occasion to develop the precise weight to be accorded each of the various interests present in *Crow*. It is sufficient for present purposes to state that it is our position therein that unemployment terminations present perhaps a more compelling case for a prior evidentiary hearing than welfare terminations. The factual issues are more complex; the governmental interest in summary adjudication is far less substantial since recoupment of overpayments is available; like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is an *earned* "contractual right" upon which Congress intended workers to be able to rely should they become involuntarily unemployed. *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131. Thus, it follows that the procedural safeguards enumerated in *Goldberg* are applicable in *Crow*.

The instant case is one involving competing claims of private parties (the injured worker and the insurer) to a single corpus of funds. Thus, it falls within the broad category, that also includes *Sniadach*, *Fuentes* and *W. T. Grant*, in which the interests that militate against an evidentiary pre-termination hearing are those of the other private party.

In contrast, the *Crow* case, like *Goldberg* v. *Kelly* and *Wheeler,* involves a dispute solely between the recipient of a program of sustaining public benefits and the government. Unemployment benefits, in contrast to workmen's compensation, are paid directly "by the state out of state funds derived from taxation." *N.L.R.B.* v. *Gullett Gin Co.,* 340 U.S. 361, 364; *see, Java,* 402 U.S. at 136 (Douglas, J., concurring). Moreover, unlike workmen's compensation, the state regulates and administers all phases of the unemployment benefits program, investigating all claims for benefits, resolving all eligibility issues without regard to any agreements between private parties, and defending termination decisions as an adverse party in further administrative and judicial proceedings. *See,* Virginia's Motion to Affirm, pp. 5-6. The government, of course, unlike a private insurer, has no competing due process claim.

Thus, while the conclusion is compelling that an evidentiary pre-termination hearing is required in the instant case, which is one of first impression, the conclusion that such a hearing is required in *Crow* is mandated by *Goldberg.*

CONCLUSION

For the above stated reasons, as well as those stated by the appellants, the decision below should be reversed.

Respectfully submitted,

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